(2)

No. 99-1427

Supreme Court, U.S.
FILED
MAY 1 - 2000
CLERK

IN THE

Supreme Court of the United States

COMPETITION POLICY INSTITUTE,

Petitioner,

v.

U S WEST, INC., ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

DAN L. POOLE
ROBERT B. MCKENNA
KATHRYN MARIE KRAUSE
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2859
Counsel for U S WEST, Inc.

M. ROBERT SUTHERLAND
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610
(404) 249-4839
Counsel for BellSouth Corp.

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JAMES D. ELLIS
ALFRED G. RICHTER, JR.
175 E. Houston
San Antonio, TX 76802
(210) 351-3500

WILLIAM A. BROWN
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8904
Counsel for
SBC Communications, Inc.

May 1, 2000

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

38 pp

RULE 29.6 STATEMENT

U S WEST, Inc. is a publicly held corporation which provides products and services to the public through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of U S WEST, Inc.

On July 18, 1999, U S WEST, Inc. and Qwest Communications International Inc. entered into an Agreement and Plan of Merger. Upon completion of the merger, the name of the surviving entity will be Qwest Communications International Inc. On August 19, 1999, the Securities and Exchange Commission decided not to review the companies' registration statement filing. On September 7, 1999, the Department of Justice approved the merger. Shareholders of the companies approved the merger on November 2, 1999. On March 10, 2000, the Federal Communications Commission conditionally granted applications filed by U S WEST, Inc. and Qwest Communications International Inc. to transfer control of licenses and lines in connection with the merger.

BellSouth Corporation is a publicly held corporation which provides products and services to the public through its operating subsidiaries. There is no publicly held company that owns 10% or more of the stock of BellSouth Corporation.

SBC Communications Inc. (formerly Southwestern Bell Corporation) is a publicly held corporation with equity and debt in the hands of the general public. The subsidiaries of SBC Communications Inc. are principally engaged in the business of providing communications services and products to the general public. SBC Communications Inc. has no parent corporation. No publicly held company has a 10 percent or greater ownership interest in SBC Communications Inc.

TABLE OF CONTENTS

RULE 29.6 STATEMENT i

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE 2

1. Regulatory Background 4

2. The 1996 Telecommunications Act 6

3. The FCC's Notice of Proposed Rulemaking 8

4. The Administrative Record 9

5. The FCC's Order 13

6. The Court of Appeals' Decision 14

REASONS FOR DENYING THE WRIT 15

I. CERTIORARI SHOULD BE DENIED IN LIGHT OF THE GOVERNMENT'S DECISION NOT TO SEEK THIS COURT'S REVIEW 15

II. CERTIORARI SHOULD BE DENIED BECAUSE THE MATTER IS ON REMAND AND SHOULD BE LEFT TO THE FCC'S CONSIDERATION ... 17

III. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT APPLIED SETTLED LAW AND CREATED NO CIRCUIT SPLIT 18

A. The Tenth Circuit Applied Settled Law 19

B. The "Privacy" Interest Cited By CPI Is Inconsistent With The Administrative Record 22

C. CPI's Criticisms of the Decision Below Are Misplaced 23

CONCLUSION 30

TABLE OF AUTHORITIES

Cases: **Page**

Ashwander v. Tennessee Valley Auth., 297 U.S. 288 (1936) 18
AT&T Communications, Inc. v. Southwestern Bell Tel. Co., No. A 96-CA-397 SS (W.D. Tex. 1996) 28
California v. FCC, 39 F.3d 919 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995) 5
Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n, 447 U.S. 557 (1980) 14, 18, 19, 28
Chevron U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 14
City of Cincinnati v. Discovery Network, Inc., 507 U.S. 410 (1993) 21, 28
Denver Area Educ. Telecom. Assn., Inc. v. FCC, 518 U.S. 727 (1996) 29
Diamond v. Charles, 476 U.S. 54 (1986) 16
Edenfield v. Fane, 507 U.S. 761 (1993) 16, 21, 25
Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council, 485 U.S. 568 (1988) 19, 22
44 Liquormart, Inc. v. Rhode Island, 517 U.S. 484 (1996) 21, 27
Greater New Orleans Broadcasting Council v. United States, 119 S. Ct. 1923 (1999) 21, 29
Ibanez v. Florida Dept. of Business & Professional Reg., 512 U.S. 136 (1994) 21
Landmark Communications, Inc. v. Virginia, 435 U.S. 829 (1978) 29
Linda R.S. v. Richard D., 410 U.S. 614 (1973) 16
Los Angeles Police Dept. v. United Reporting Publishing Corp., 120 S. Ct. 483 (1999) 27
Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 16

Cases (continued): **Page**

Martin v. Struthers, 319 U.S. 141 (1943) 26-27
Meredith Corp. v. FCC,
809 F.2d 863 (D.C. Cir. 1987) 22
Meyer v. Grant, 486 U.S. 414 (1988) 25, 27
Minneapolis Star v. Minnesota Comm'r
of Revenue, 460 U.S. 575 (1983) 24
NAACP v. Claiborne Hardware Co.,
458 U.S. 886 (1982) 27
NTEU v. United States, 513 U.S. 454 (1995) 26
Riley v. National Federation of the Blind, Inc.,
487 U.S. 781 (1988) 26
Rubin v. Coors Brewing Co.,
514 U.S. 476 (1995) 20, 21, 25, 27-29
SBC Communications, Inc. v. FCC,
56 F.3d 1484 (D.C. Cir. 1995) 6
Schaumburg v. Citizens for a Better
Environment, 444 U.S. 620 (1980) 26
Schneider v. State of New Jersey,
308 U.S. 147 (1939) 25
SEC v. Chenery Corp., 332 U.S. 194 (1947) 16
Secretary of State of Maryland v. Joseph
H. Munson Co., 467 U.S. 947 (1984) 26
Shapero v. Kentucky Bar Ass'n,
486 U.S. 466 (1988) 25
Simon & Schuster, Inc. v. Members of New York
State Crime Victims Bd., 502 U.S. 105 (1991) 26
Southwestern Bell Tel. Co. v. Public Util. Comm'n of
Texas, 812 F. Supp. 706 (W.D. Tex. 1993) 5
Turner Broadcasting System, Inc. v. FCC,
512 U.S. 622 (1994) 29
Turner Broadcasting System, Inc. v. FCC,
520 U.S. 180, 187 (1997) 29

Statutes and Legislative Materials: **Page**

15 U.S.C. § 1681b 13
15 U.S.C. § 1692c 13
47 U.S.C. § 222 ..... 3, 4, 6-9, 17, 21-22, 24, 28-29
47 U.S.C. § 272 8
47 U.S.C. § 274 8
47 U.S.C. § 551 13
47 U.S.C. § 601 8
H.R. 3432, 103d Cong, 1st Sess. (1993) 7
H.R. 3626, 103d Sess., 2d Sess. (1994) 7
S. Rep. No. 230, 104th Cong. 2d Sess. (1997) 8

Administrative Materials: **Page**

BNA Third Order on Reconsideration,
11 FCC Rcd 6835 (1996) 21
Computer III Phase II Reconsideration Order,
3 FCC Rcd 1159 (1988) 6
Computer III Remand Order, 6 FCC Rcd. 7571 (1991) .. 4, 5
Computer III Remand Proceedings: Rules Governing Telephone Carriers' Use of CPNI,
11 FCC Rcd 16617 (1996) 8
Implementation of the Telecommunications Act of 1996, Second Report and Order,
13 FCC Rcd 8061
(1998) 4, 8, 13-14, 19-20, 24-25, 28
In re Applications of McCaw & AT&T Co., 10 FCC Rcd 11786 (1995) 5-6
Notice of Proposed Rulemaking, 11 FCC Rcd
12513 (1996) 5, 8-9
Phase II Order, 2 FCC Rcd 3072 (1987) 6
Phase II Further Reconsideration Order,
4 FCC Rcd 5927 (1989), *vacated on other grounds*, 905 F.2d 1217 (9th Cir. 1990) 6

Administrative Materials (continued): **Page**

Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Order on Reconsideration, 14 FCC Rcd 14409 (released Sept. 3, 1999; adopted Aug. 16, 1999) 17-18
Universal Card Order, 8 FCC Rcd 8782 (1993) 8

Miscellaneous: **Page**

Fed. R. Civ. P. 23 20
"Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995) 12
Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE (7th ed. 1993) 16
U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information" (Oct. 1995) 12
Uniform Health Care Information Act, 9 U.L.A. 475 (1988 & Supp. 1992) 13

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondents U S WEST, Inc., BellSouth Corporation, and SBC Communications, Inc. respectfully submit this brief in opposition to the petition for certiorari filed by the Competition Policy Institute (CPI).

In this case, the U.S. Court of Appeals for the Tenth Circuit vacated a Federal Communications Commission (FCC) Order and accompanying regulations, and remanded the matter to the FCC for further proceedings.

In reaching its decision, the Tenth Circuit applied settled First Amendment principles. The Court of Appeals faithfully followed governing precedent and did not create any circuit split. This case involves no novel legal issue or unresolved question of law. Instead, the Tenth Circuit's decision is fact-specific and highly dependent on the particular administrative record assembled before the FCC. Certiorari is unwarranted because the decision below is demonstrably correct and because this Court's review would be limited to the case-specific application of settled law to the facts of this record.

Moreover, the Government has decided *not* to file a petition for certiorari with respect to the Tenth Circuit's decision. In fact, since issuing the initial Order reviewed by the Tenth Circuit, the FCC has subsequently released an Order on Reconsideration reexamining several aspects of the original Order. The Tenth Circuit did not invalidate the statute which the FCC's rules purported to implement, nor did the Court of Appeals preclude the FCC from commencing a rulemaking to promulgate new regulations. The matter has been remanded to the FCC and should be left to the Commission's consideration.

CPI, a purely private party which was an intervenor in support of the FCC below, has sought this Court's review. However, the Government's decision not to seek certiorari means that CPI's petition should be denied. The FCC, not CPI, is the governmental agency charged by Congress with the responsibility for promulgating and enforcing the rules in question. The FCC's determination not to seek certiorari from

the Tenth Circuit's decision vacating its rules should thus be accorded great, and indeed decisive, weight.

CPI's claim that the Tenth Circuit's judgment sets a precedent for "personal privacy in today's 'information age'" that "will have far-reaching consequences" (Pet. 2) is hyperbole. Even if that statement were accurate, which it is not, the supposed novelty and complexity of the issues would militate strongly *against* review here, particularly because the Government has not filed a petition for certiorari; the FCC has issued an Order on Reconsideration; and no lower court except the Tenth Circuit has addressed the matter.

CPI's petition should be denied.

STATEMENT OF THE CASE

This case involves rules adopted by the FCC to restrict the First Amendment right of telephone carriers to speak to their customers using telephone company business records unless the carriers first obtain the customers' prior affirmative consent. The rules also restrict the concomitant right of customers to receive targeted communications from telephone carriers.

The FCC attempted to prevent carriers from identifying which of their customers, based on their past purchasing habits, were most likely to be interested in subscribing to new services like cellular and long distance, and to prevent the telephone companies from marketing to their own subscribers on that basis. Thus, the FCC's regulations prevented telephone carriers from engaging in targeted communications and forced them to market, if at all, through blanket, undifferentiated solicitations directed at all their customers in a blunderbuss fashion.

The business information at issue is known as "customer proprietary network information" (CPNI). CPNI is commercial information that a telephone carrier accumulates in the course of doing business with individual members of the public. CPNI includes information about what services customers purchase and how they make use of those services, such as number of

telephone lines, service location, type and class of service, and usage levels (including the numbers called).[1] CPNI is comparable to the information that credit card companies, grocery stores, mail-order catalogs, banks, Internet service providers, and many other firms accumulate about their customers' purchasing and usage characteristics, as part of their routine business operations. Without CPNI, telephone companies could not run their businesses at all.

In particular, without using CPNI, telephone companies could not tailor their communications to customers about services to meet the customers' telecommunications needs. If communications occurred at all, they would take the form of mass outbound telemarketing or direct mail solicitations going to many customers who have little use for or interest in the particular services being offered. CPNI is thus essential in enabling a carrier to communicate with its customers effectively and to avoid undue intrusions (unwelcome dinner-time phone solicitations, for example) on those individuals least likely to be interested in those communications.

The FCC's rules purported to implement Section 222 of the Telecommunications Act of 1996, which restricts the ability of telecommunications carriers to "use, disclose, or permit access to" CPNI, except "with the approval of the customer." 47 U.S.C. § 222(c)(1) (West Supp. 1999). The FCC interpreted the term "approval" in Section 222 as requiring carriers to obtain prior affirmative customer consent before using CPNI to speak, rather

---

[1] The relevant federal statute defines CPNI as "(A) information that relates to the quantity, technical configuration, type, destination, and amount of use of a telecommunications service subscribed to by any customer of a telecommunications carrier, and that is made available to the carrier by the customer solely by virtue of the customer-carrier relationship; and (B) information contained in the bills pertaining to telephone exchange service or telephone toll service received by a customer of a carrier; except that such term does not include subscriber list information." 47 U.S.C. § 222(f)(1).

than allowing carriers simply to give their customers the opportunity to veto such use of the CPNI. In choosing "opt-in" over "opt-out," the CPNI rules departed markedly from well-settled regulatory policy, were at odds with overwhelming evidence regarding customers' expectations of their relationships with their existing carriers, and were in no way compelled by the statutory language or legislative history of Section 222.

1. ***Regulatory Background.***

Prior to Congress' enactment of Section 222, the FCC had given extensive consideration to the CPNI issue, although it had adopted rules only with regard to certain carriers and certain types of services. In particular, the FCC had repeatedly rejected prior affirmative consent requirements. The FCC's rules generally permitted carriers to use CPNI to market new and innovative services without any expression of customer approval beyond that implied in a carrier-customer relationship. In general, the FCC's rules were designed around limited customer notifications and opt-out rights.

The FCC's CPNI safeguards were limited to certain offerings by AT&T, the Bell Operating Companies (BOCs), and GTE. *See Implementation of the Telecommunications Act of 1996*, Second Report and Order, 13 FCC Rcd 8061, at ¶¶ 174-79 (1998) (*CPNI Order*).[2] Other carriers were free to use CPNI in any way they wished. Similarly, AT&T, the BOCs, and GTE could freely use CPNI with respect to services other than those addressed by the

---

[2] For example, the BOCs, AT&T and GTE were required to send annual notices of CPNI rights regarding enhanced services such as voicemail or data processing to all of their multi-line (2 or more lines) business customers. The BOCs and GTE (but not AT&T) were required to obtain prior written authorization from business customers with 20 or more access lines before using CPNI to market enhanced services (but not customer premises equipment, such as telephone sets). *See CPNI Order* at ¶ 176. The evidence showed that, given the large size and close carrier relationship with such customers, the rule was not a burden on carriers in practice, and it was never challenged in court. *Computer III Remand Order*, 6 FCC Rcd 7571, 7611 ¶ 86 (1991).

Commission.

Further, the FCC's predecessor CPNI rules were crafted to minimize restrictions on the use of this valuable commercial information. Such restrictions, the FCC recognized, would have hindered one-stop shopping and joint marketing and defeated the important federal goals of carrier efficiencies and customer convenience. The FCC concluded that, "[u]nder a prior authorization rule, a large majority of mass market customers are likely to have their CPNI restricted through inaction .... Thus, a prior authorization rule would vitiate a BOC's ability to achieve efficiencies through integrated marketing to smaller customers." *Computer III Remand Order*, 6 FCC Rcd. 7571, 7610 n.155 (1991). Accordingly, the FCC preempted state CPNI rules that might require prior authorization, "determining that such state rules would effectively negate federal policies promoting both carrier efficiency and consumer benefits." *NPRM*, 11 FCC Rcd 12513, 12522 ¶ 16 (1996). The Ninth Circuit upheld this preemption determination, opining that, "[i]f small customers are required to take an affirmative step of authorizing access to their information, they are unlikely to exercise this option [which will] impair the development of the mass market for enhanced services in the small customer market." *California v. FCC*, 39 F.3d 919, 921 (9th Cir. 1994), *cert. denied*, 514 U.S. 1050 (1995). *See Southwestern Bell Tel. Co. v. Public Util. Comm'n of Texas*, 812 F. Supp. 706, 709 (W.D. Tex. 1993) (upholding FCC's conclusion that "prior authorization rules would require separation of basic and enhanced marketing personnel, defeating the goal of integration of all marketing forces.").

Subsequently, when AT&T acquired McCaw's cellular operations in 1995, the FCC refused to bar AT&T from sharing its long-distance CPNI with its new cellular affiliate, finding that neither customer privacy nor competitive equity warranted such a prohibition. The FCC cited "consumer choice and efficiency" as the basis for its ruling, reasoning that any customers with contrary desires could readily opt out. *In re Applications of*

McCaw & AT&T Co., 10 FCC Rcd 11786, 11794 (1995). The FCC vigorously defended this view on appeal,[3] and the D.C. Circuit upheld its determination that allowing AT&T/McCaw to use AT&T's long-distance CPNI to solicit the cellular customers of competing providers would "lead to lower prices and improved service offerings." *SBC Communications, Inc. v. FCC*, 56 F.3d 1484, 1495 (D.C. Cir. 1995).

In short, the FCC concluded time and again that a prior affirmative consent requirement to use CPNI was unnecessary to protect competition,[4] unnecessary to protect customer privacy,[5] and at odds with efficient carrier operations, joint marketing, and customers' desire for one-stop shopping.[6]

2. *The 1996 Telecommunications Act.*

Against the background of the lengthy CPNI regulatory history, Congress adopted Section 222 in the 1996 Telecommunications Act. That Section applies to all telecommunications services and to all carriers, rather than merely to some services and to only AT&T, the BOCs, and GTE, as had been the FCC's previous approach. Congress made no finding that the FCC's prior approach to CPNI had been inadequate or contrary to the public interest. Without

---

[3] The FCC explained that "courts have consistently recognized that capitalizing on informational efficiencies . . . is not the sort of conduct that harms competition," and that it "is manifestly pro-competitive and beneficial to consumers to allow a multi-product firm . . . maximum freedom in offering its competitive services to all of its customers" by utilizing CPNI. Brief for Appellee FCC in *Southwestern Bell Corp. v. FCC*, Nos. 94-1637, 94-1639, at 49 (D.C. Cir. filed Feb. 13, 1995).

[4] *See Phase II Order*, 2 FCC Rcd 3072, 3094 (1987); *Phase II Further Reconsideration Order*, 4 FCC Rcd 5927, 5929 (1989), *vacated on other grounds*, 905 F.2d 1217 (9th Cir. 1990).

[5] *Computer III Phase II Reconsideration Order*, 3 FCC Rcd 1159, 1163 ¶ 98 (1988); *Phase II Order*, 2 FCC Rcd 3072, 3094 ¶ 152 (1987).

[6] *See AT&T CPE Relief Order*, 102 FCC 2d 655, 678-79, 692-93 (1985); *BOC CPE Relief Order*, 2 FCC Rcd 143, 147-48, 167 n.86 (1987).

repudiating that approach, Congress struck what it deemed to be the appropriate balance between (i) privacy interests and (ii) competitive efficiencies and carrier rights.

Section 222 provides that telecommunications carriers are free to use CPNI in their "provision of (A) the telecommunications service from which such information is derived, or (B) services necessary to, or used in, the provision of such telecommunications service." 47 U.S.C. § 222(c)(1). In order for a telecommunications carrier to use CPNI for broader purposes, the use must be "required by law or with the approval of the customer" or must qualify under one of the exceptions stated in Section 222(d).[7]

There is no indication in Section 222(c)(1) that Congress intended the word "approval" to require before-the-fact, explicit customer consent through an affirmative act. Indeed, Section 222(c)(1) stands in stark contrast to Section 222(c)(2), which requires telecommunications carriers to provide CPNI in their possession to any entity designated by the customer, "upon *affirmative* written request by the customer." (emphasis added). Notably, Section 222(c)(1) contains neither the word "affirmative," nor the term "express."

The clear textual basis for concluding that Congress meant *not* to require "affirmative" customer consent is buttressed by the legislative history. Section 222 emerged from a series of House bills that would have required an "affirmative request" from the customer before a local exchange carrier could use CPNI beyond certain specified purposes. H.R. 3432, 103d Cong, 1st Sess. (1993). The next legislative proposal expanded the scope of the provision to all carriers. H.R. 3626, 103d Sess., 2d Sess. (1994). The bill also removed the term "affirmative" and inserted the word "approval."

---

[7] These exceptions include the initiating, rendering and billing of services; fraud prevention; and the provision of inbound telemarketing, referral or administrative services on an inbound call if the customer approves of the use of CPNI during the call.

Section 222 was adopted in the context of sweeping deregulatory measures designed to foster competition in all telecommunications markets. Congress acknowledged that customers want "one-stop shopping" (S. Rep. No. 230, 104th Cong. 2d Sess. 22-23 (1997)) and fostered the integration of telecommunications services by granting telecommunications carriers joint marketing authority with respect to long distance (47 U.S.C. § 272), electronic publishing (47 U.S.C. § 274), and wireless services (47 U.S.C. § 601). As the FCC itself has acknowledged, these activities require carrier use of CPNI. *See, e.g., Universal Card Order*, 8 FCC Rcd 8782, 8787 ¶ 27 (1993).

Hence, a proper interpretation of Section 222 would recognize that Congress did not intend to impose a prior affirmative consent requirement. Indeed, such a requirement would frustrate the statutory scheme and joint marketing opportunities created by Congress.

3. The FCC's Notice of Proposed Rulemaking.

The FCC soon sought to revise the congressional balance. As a self-effectuating statutory provision,[8] Section 222 required no independent FCC rulemaking. However, in February 1996, several local telephone company associations advised the FCC that their members — who, unlike the BOCs, AT&T, and GTE, had never been subject to CPNI rules — were unclear about their obligations under Section 222 and requested the Commission to provide "guidance" regarding such obligations. *CPNI Order* at ¶ 6 & n. 15. Subsequently, NYNEX, a BOC, filed a petition for a declaratory ruling regarding the proper interpretation of a single aspect of Section 222 — the scope of the phrase "telecommunications service." Designated Excerpts of Record on Appeal ("R.") Tab 46. The FCC responded by initiating a broad-based rulemaking regarding the meaning of much of the Section. *Notice of Proposed Rulemaking*, 11 FCC Rcd 12513

---

[8] *Computer III Remand Proceedings: Rules Governing Telephone Carriers' Use of CPNI*, 11 FCC Rcd 16617, 16619 (1996).

(1996) (*NPRM*).

In the *NPRM*, the FCC read Section 222 as revolutionizing the CPNI rules for telecommunications carriers. Despite the long-standing absence of a prior authorization requirement with respect to the use of CPNI, the FCC in the *NPRM* repeatedly referred to "prior" customer "authorization" as potentially being mandated by Section 222(c)(1), *see NPRM* at ¶¶ 20, 21, 23, 26, even though the words "prior" or "authorization" never appear in that subsection.

The Commission also set out its tentative conclusions regarding the meaning of the term "telecommunications service" as used in Section 222. It concluded that the term should be construed to reflect three separate "traditional service distinctions": local exchange (including local long-distance or short-haul toll), interexchange (also including short-haul toll) and Commercial Mobile Radio Service (CMRS or wireless). The significance of the categories was that, barring some type of customer "approval," carriers would be limited in their ability to use CPNI across service categories to communicate with customers.

4. *The Administrative Record.*

The *NPRM* raised the spectre of a serious disruption in the carrier-customer relationship. An extensive administrative record was created as a host of commenters urged the Commission to reconsider its tentative views with respect to both the appropriate scope of the term "telecommunications service" and the construction of the word "approval." R. Tabs 2-10, 13, 15-31, 33, 34, 36-39, 42, 43. The administrative record is significant because it eliminates any justification for the FCC's CPNI rules.

U S WEST and other parties urged the Commission to adopt a construction of the word "approval" that was consonant with reasonable customer expectations and commercial practices. The commenters noted that "approval" could be construed in a variety of ways, ranging from tacit or implied approval stemming from an existing business relationship, to a notice and opt-out

approval scheme, to oral or written express consents in the context of disclosure of information to unaffiliated third parties. R. Tabs 28, 36.

U S WEST acknowledged that the FCC might decide that the use of a notice and opt-out approval mechanism was not sufficient with respect to the disclosure of CPNI to unaffiliated third parties having no relationship with the customer's carrier. However, U S WEST and others urged the FCC to differentiate between third-party disclosures and internal use of CPNI. U S WEST maintained that the undisputed record evidence showed that customers expected CPNI to be shared within the corporate family with which they have a business relationship. R. Tab 14, at 10-11; Tab 18, at 4-6; Tab 20; Tab 23, at 2-3; Tab 36, at 15-20.

Pacific Telesis (now a part of SBC Communications, Inc.) provided the Commission with a public opinion survey on the use of CPNI by local telephone companies conducted under the leadership of Dr. Alan Westin, Professor of Public Law and Government at Columbia University and one of the world's leading authorities on information policy and privacy. R. Tab 20. The study concluded that:

• The public has a great deal of confidence in telephone companies (particularly local companies) and trusts them to protect the confidentiality of the personal information they collect about customers and to use it in a responsible way.

• Despite a generalized concern over privacy issues, large majorities of the public believe it is acceptable for businesses, and in particular local telephone companies, to communicate with their own customers to offer them additional services, especially if those not wishing to receive such communications are provided with an opt-out opportunity.

• In particular, a large public majority believes that it is acceptable for local telephone companies to communicate with their own customers using CPNI data. The availability of an opt-out procedure brings initial approvals of local telephone company use of CPNI from the two-out-of-three respondent level

up to the 80% range of public approval.

• Individuals understand "notice and opt out" procedures, and many have used them in one context or another.

Bell Atlantic presented survey evidence demonstrating that 85.9% of respondents wanted to deal with a single carrier for all of their telecommunications needs and noted another study documenting customer interest in one-stop shopping. R. Tab 34. Cincinnati Bell Telephone (CBT) submitted a survey showing that the "vast majority of customers surveyed (81.5%) want[ed] to be kept aware of the services" offered by their local carrier and those same customers expected their carrier to use CPNI to tailor the communication. R. Tab 42.

In addition, U S WEST designed a trial to test the feasibility of securing written or oral affirmative customer consents. The trial showed the devastating effect that an affirmative customer consent requirement would have on a carrier's ability to use CPNI internally as well the barrier to communication that such a consent requirement would impose. R. Tab 10. For example, the outbound mail campaign successfully resulted in affirmative consents in only 6-11% of cases. The outbound calling campaign produced consents in the range of 29%, with refusals in about the same amount. Significantly, with respect to the outbound calling portion of the trial, U S WEST was not even able to reach one-third of the customers it attempted to contact for purposes of requesting consent. The offering of incentives appeared to have no material impact on the frequency with which consents were provided. Extrapolating to its service population of over 11 million customers, U S WEST estimated that it would cost in excess of $202 million to $336 million simply to request affirmative CPNI consents from its customer base. And even that immense expenditure would not assure contact with each individual, much less assure that the customer would understand and consider the CPNI affirmative consent request.

Together with this evidence, U S WEST submitted a detailed constitutional analysis by Professor Laurence Tribe (now counsel of record for respondents) concluding that an affirmative consent

requirement presented serious First Amendment questions. R. Tabs 11, 14.

The FCC was also advised of an analysis by the Privacy Working Group of the Clinton Administration's National Information Infrastructure Task Force (NIITF),[9] as well as a prior study by the National Telecommunications and Information Administration (NTIA) of the Department of Commerce.[10] Both organizations concluded that an opt-out method of customer approval was generally appropriate with respect to the commercial use of individually-identifiable information. The NTIA also submitted comments directly to the FCC contending that an opt-out process represented an appropriate means for securing customers' approval, in the context of an existing customer-carrier relationship. R. Tab 16.

The carrier submissions to the FCC also included a copy of a recent Report to Congress by the Federal Trade Commission (FTC) involving certain types of "locator" services. R. Tab 6. That report, which involved information far more sensitive than CPNI, generally endorsed the self-regulatory guidelines promulgated by the industry participants. Those guidelines included only an "opt out" provision with respect to use of personally-identifiable information.

Further, the comments noted that the FCC's proposed approach was inconsistent with other federal statutes regulating customer "privacy." Other laws generally grant notice and opt-out rights only, rather than imposing the kinds of draconian rules promulgated by the FCC. For example, cable operators are allowed to use subscriber information for their own business

---

[9] *See* "Privacy and the National Information Infrastructure: Principles for Providing and Using Personal Information, A Report of the Privacy Working Group" (Oct. 1995).

[10] *See* U.S. Department of Commerce, NTIA, "Privacy and the NII: Safeguarding Telecommunications-Related Personal Information" (Oct. 1995).

purposes and are required to obtain affirmative approval only to share that information with unaffiliated third persons. 47 U.S.C. § 551(c)(1). The Fair Debt Collection Practices Act of 1977 permits debt collectors to disclose a debtor's financial situation to credit reporting agencies. 15 U.S.C. § 1692c(b). The 1996 Consumer Credit Reporting Reform Act allows credit reporting agencies to furnish consumer credit information for marketing credit or insurance opportunities to consumers, so long as the agency establishes a toll-free number so that consumers can call and opt out by having their names removed from lists for direct marketing purposes. 15 U.S.C. § 1681b(c)(5). The Uniform Health Care Information Act, adopted by the National Conference of Commissioners on Uniform State Laws, *see* 9 U.L.A. 475 (1988 & Supp. 1992), created an opt-out scheme for certain disclosures of medical information. *Id.* at §§ 2-103, 2-104.

5. *The FCC's Order*

The FCC overrode this assembled administrative record. The *CPNI Order* is a 261-paragraph order purporting to implement a six-paragraph self-effectuating statutory provision. That the FCC managed to derive so lengthy and detailed an order from a deregulatory statute demonstrates how far the Commission strayed from Congress' intent. The FCC rejected the expert views of other agencies; rejected authoritative evidence demonstrating the adequacy of a notice-and-opt-out approval model; and rejected the constitutional analyses submitted by U S WEST.

Instead, the FCC adopted a series of rules forbidding carriers to speak to customers using CPNI without prior affirmative consent. Under the FCC's so-called "total service approach," a multiproduct carrier providing local service to a particular customer would not be able to use CPNI, without prior customer consent, to speak to that customer regarding cellular or long-distance service. A carrier could offer a customer voicemail service to which calls might be routed if the wireline telephone were not answered but could not – without the customer's prior

affirmative consent – use customer information to offer a wireless service to which the same calls might be directed instead.

The result of the *CPNI Order* is that carriers having a relationship with customers may not use CPNI associated with a customer's purchasing behaviors or service use to determine whether the customer would likely be interested in information about another service offering, *unless* the carrier has had a *prior* communication with the customer and has secured an express authorization to use the information in that manner. In short, the FCC forbade telecommunications carriers from speaking with the assistance of CPNI unless they were able to secure prior affirmative consent from each of their millions of individual customers — who are themselves often served by more than one carrier.

6. *The Court of Appeals' Decision.*

The Tenth Circuit properly vacated the FCC's CPNI rules. The court held that the FCC's regulations presented substantial free speech questions because they amounted to "a restriction on speech tailored to a particular audience." Pet. App. 12a. The Court of Appeals therefore held that the rules were not entitled to deference under the doctrine of *Chevron U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984).

The Court of Appeals applied the familiar four-part test for regulations of commercial speech set out in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 562-63 (1980). The court found that "[t]he government presents no evidence showing the harm to either privacy or competition is real. Instead, the government relies on speculation" of the kind this Court has repeatedly held to be inadequate in the context of intermediate First Amendment scrutiny. Pet. App. 26a. The court also held that the FCC's rules were not narrowly tailored to protecting either privacy or competition because a notice and opt-out alternative was an obvious and less restrictive way of achieving the government's objectives. The court concluded

that, "based on the record before us, the agency has failed to satisfy its burden of showing that the customer approval regulations restrict no more speech than necessary to serve the asserted state interests." *Id.* at 32a. The court did not prescribe the promulgation of any particular regulations but left to the administrative process the question of whether a further rulemaking was necessary.

REASONS FOR DENYING THE WRIT

I. CERTIORARI SHOULD BE DENIED IN LIGHT OF THE GOVERNMENT'S DECISION NOT TO SEEK THIS COURT'S REVIEW.

CPI trumpets the "separation of powers," the importance of "agency responsibility," and the need for "regulatory discretion." Pet. 20, 22. CPI contends that no party must be permitted to "encroac[h] upon the power of the executive branch to adopt regulatory policy within its statutory authority." Pet. 22.

But those principles strongly militate *against* certiorari in this case. Here, the FCC has exercised its "regulatory discretion" by *not* seeking this Court's review. The only petition for certiorari pending before this Court has been filed by CPI, not by the Government. The Government, represented by counsel intimately familiar with this Court's criteria for granting certiorari, has determined that further review is not warranted at this time. Where appropriate, the Solicitor General has shown no hesitation in petitioning for certiorari from decisions invalidating federal statutes or regulations on First Amendment grounds. *E.g.*, *United States v. Players Int'l*, No. 98-721; *United States v. Chesapeake & Potomac Tel. Co.*, Nos. 94-1893, 94-1900; *Rubin v. Coors Brewing Co.*, No. 93-1631. CPI's effort to second-guess the FCC's determination that this case does not merit certiorari is exceedingly anomalous. A private party's petition for certiorari should ordinarily be denied when the very agency that promulgated the rules in question has deliberately

decided *not* to seek this Court's review.

"Vindicating the *public* interest . . . is the function of Congress and the Chief Executive." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 576 (1992) (emphasis in original). To grant review where the Government has not filed a petition for certiorari would come perilously close to "transfer[ring] from the President to the courts the Chief Executive's most important constitutional duty, to 'take Care that the Laws be faithfully executed." *Id.* at 577.

Accordingly, this Court has held that a private party like CPI lacks standing to pursue an appeal where the government official charged with defending a law has decided not to seek further judicial review. *See Diamond v. Charles*, 476 U.S. 54, 64-65 (1986) (private party lacks the ability to appeal the invalidation of a state statute where the state itself has not sought an appeal); *Linda R.S. v. Richard D.*, 410 U.S. 614, 619 (1973) ("a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another").

These separation of powers and Article III principles have particular salience in the First Amendment and administrative law contexts. The CPNI rules must be judged solely according to the justifications put forward by the FCC in its *Order*, not according to the *post hoc* rationalizatons of counsel (let alone private counsel) before this Court. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Edenfield v. Fane*, 507 U.S. 761, 768 (1993).

There are also practical reasons to deny certiorari where the Government has not filed its own petition. CPI acknowledges that it is financed primarily by "new entrants in the market for local telephone service." Pet. ii. In this case, it will represent the economic interest of its sponsors rather than any broader public interest. In the absence of a petition by the Government, the issues raised by CPI would undoubtedly be colored by, if not completely subordinated to, its own private interest. *See* Robert L. Stern, Eugene Gressman, Stephen M. Shapiro & Kenneth S. Geller, SUPREME COURT PRACTICE § 4.11, at 184-85 (7th ed.

1993) ("an issue the Court deems of interest and importance only to the immediate parties to the case is not likely to qualify as worthy of further consideration").

For all these reasons, certiorari is inappropriate in light of the Government's decision not to seek this Court's review.

II. CERTIORARI SHOULD BE DENIED BECAUSE THE MATTER IS ON REMAND AND SHOULD BE LEFT TO THE FCC'S CONSIDERATION.

Certiorari is unwarranted for the further reason that the CPNI rules vacated by the Tenth Circuit are on remand to the FCC. The Court of Appeals did not invalidate Section 222 or hold that the FCC was completely precluded from adopting any rules to implement the provision. Nor did the Tenth Circuit direct the Commission to take any specific course of action or to adopt any specific proposal in place of the CPNI rules. Rather, the Tenth Circuit held only that "[t]he FCC failed to adequately consider the constitutional implications of its CPNI regulations. . . . [W]e do not 'advocate' any specific approach. We merely find fault in the FCC's inadequate consideration of the approval mechanism alternatives in light of the First Amendment." Pet. App. 33a & n.15.

The FCC is best situated to address the deficiencies in the CPNI rules in the first instance. Denial of certiorari will accordingly allow the FCC to exercise what CPI calls the government's "regulatory discretion" on remand. Pet. 22.

Indeed, on September 3, 1999, the FCC released an Order on Reconsideration in the CPNI proceeding, reducing the restrictions on telephone companies' use of CPNI to market services and equipment to their own customers. *Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, Order on Reconsideration, 14 FCC Rcd 14409 (released Sept. 3, 1999; adopted Aug. 16, 1999). For example, the Order on Reconsideration permitted telephone companies to use CPNI to

market to their customers equipment and information services that are necessary to, or used in, the provision of their telephone service, such as telephones, caller ID units, voicemail, and certain fax services without first obtaining affirmative customer consent. The Reconsideration Order also allowed wireless telephone carriers to use CPNI without prior customer consent to market related information services. In addition, the Reconsideration Order allowed all telephone companies to use CPNI in their efforts to "win back" customers lost to competitors, reasoning that "winback" campaigns are good for competition.

In short, the Reconsideration Order shows that the FCC has already revised its views of Section 222's requirements. Although the legal status of the Reconsideration Order is questionable given the Tenth Circuit's decision vacating the underlying *CPNI Order*, the Reconsideration Order demonstrates that the original *CPNI Order* no longer reflects the FCC's position. The CPNI issue has been remanded to the FCC and should be left to the Commission's consideration.

III. CERTIORARI SHOULD BE DENIED BECAUSE THE TENTH CIRCUIT APPLIED SETTLED LAW AND CREATED NO CIRCUIT SPLIT.

Certiorari is inappropriate for the further reason that the Court of Appeals applied settled First Amendment principles as reflected in the *Central Hudson* test. The Tenth Circuit created no circuit split and faithfully followed governing precedent.

Moreover, the Tenth Circuit's decision is a modest one that can be read as resting on the principle of constitutional avoidance reflected in *Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 341 (1936) (Brandeis, J., concurring). The Tenth Circuit held that either the FCC's rules violate the First Amendment or, "at the very least, . . . the CPNI regulations clearly raise a serious constitutional question, invoking the rule" (Pet. App. 33a) of

interpreting statutes to avoid a constitutional doubt. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988).

This case manifestly involves no novel legal principle or unresolved question of law. Instead, the Tenth Circuit's decision is fact-specific and highly dependent on the particular administrative record assembled before the FCC. Certiorari is unwarranted because this Court's review would be limited to the case-specific application of settled law to the facts of this record.

A. The Tenth Circuit Applied Settled Law

The Tenth Circuit properly held that, while "privacy may rise to the level of a substantial state interest," "the government cannot satisfy the second prong of the *Central Hudson* test by merely asserting a broad interest in privacy. It must specify the particular notion of privacy and interest served." Pet. App. 19a. The court noted that "[n]either Congress nor the FCC explicitly stated what 'privacy' harm Section 222 seeks to protect against." *Id.* at 21a.

The FCC acknowledged that customer approval "can be *inferred* in the context of an existing customer-carrier relationship" in some circumstances. *CPNI Order* at ¶ 23 (emphasis in original). Thus, the FCC agreed "that Congress recognized . . . that customers expect carriers with which they maintain an established relationship will use information derived through the course of that relationship to improve the customer's existing service" (*id.* at ¶ 54); that there are no significant privacy concerns with respect to the sharing of CPNI within an integrated firm (*id.* at n. 203); and that "customers expect their carriers to offer related offerings within the total service to which they subscribed." *Id.* at n. 372; *see also* n. 206. Inexplicably, however, the FCC insisted that customer marketing expectations do not "extend to all of a carrier's available service offerings." *Id.* at n.372. The Commission could cite no evidence to support this hair-splitting assertion.

Because the *CPNI Order* contended that "CPNI includes information that is extremely personal to customers" (¶ 2), which the FCC described as "sensitive" (¶ 94), the Tenth Circuit correctly inferred that the government's point was "that disclosure of CPNI information could prove embarrassing to some and that the government seeks to combat this potential harm." Pet. App. 21a. The Court of Appeals then concluded that the FCC had failed to show how its rules would directly and materially advance this interest, or that its rules were narrowly tailored — *i.e.*, that they were "no more extensive than necessary to serve [the stated] interests." *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 486 (1995). The narrow tailoring test could not be met in light of the obvious and familiar alternative of a notice and opt-out approach, *see, e.g.*, Fed. R. Civ. P. 23(c)(2) (notice and opt-out procedures in class actions), with more stringent rules reserved for third-party disclosures as may be deemed appropriate. *See* pp. 9-10, *supra.*

The notice and opt-out alternative that the FCC failed adequately to consider fully protects "customer control" by allowing customers to disapprove even a carrier's internal use of CPNI. The FCC presented no evidence or reasoned analysis to show that the failure of most customers to opt out was the product of anything other than apathy and inertia. As the Tenth Circuit found, the results of a study on which the FCC relied "may simply reflect that a substantial number of individuals are ambivalent or disinterested in the privacy of their CPNI or that consumers are averse to marketing generally." Pet. App. 30a-31a. The Tenth Circuit's reasoning was entirely consistent with the FCC's own longstanding position, endorsed by the Ninth Circuit, that requiring CPNI authorizations from customers was impracticable and unnecessary and would result in substantial denials of consents due simply to customer inertia, apathy, and confusion. *See* pp. 4-6, *supra.*

The Court of Appeals' decision is thus wholly unremarkable. The Tenth Circuit simply applied the fundamental maxim that, when the federal government adopts rules restricting expression,

the government must be careful to limit such restrictions to the scope necessary actually to accomplish whatever important purpose has been identified. As this Court has repeatedly instructed, restrictions on commercial speech cannot be justified by mere guesswork. *See Greater New Orleans Broadcasting Council v. United States*, 119 S. Ct. 1923, 1931-33 (1999); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 500 (1996) (plurality opinion); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 487-90 (1995); *Ibanez v. Florida Dept. of Business & Professional Reg.*, 512 U.S. 136, 142-44 (1994); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 416-17 (1993); *Edenfield v. Fane*, 507 U.S. 761, 767-68 (1993). The Tenth Circuit's judgment rests on nothing more controversial than this elementary principle.

The FCC rules failed this uncontroversial standard. Indeed, they failed every prong of the test for restrictions on commercial speech. They were so far from the realm of reasoned administrative analysis required by the Administrative Procedure Act, let alone the First Amendment, that the rules in fact *disserved* customer privacy. By preventing telephone companies from tailoring communications to specific customers with particular interests, the FCC would have forced telephone companies to solicit *all* their customers blindly, without any attempt at targeting — an approach that would have increased the number of dinner-time phone solicitations, which the FCC itself has described as a nuisance. *See BNA Third Order on Reconsideration*, 11 FCC Rcd 6835, 6848-49 (1996).

In addition to presenting serious constitutional questions, the FCC's requirement of explicit affirmative consent was in tension with both the text of Section 222(c)(1) and its legislative history. Rather than requiring affirmative customer consent, Congress *deleted* the term "affirmative" from predecessor bills when it enacted Section 222. Congress sought to facilitate "one-stop shopping" and joint marketing of telecommunications services, which the FCC attempted to prevent telephone companies from offering. *See* pp. 7-8, *supra*.

Thus, wholly apart from its constitutional defects, the FCC's construction of Section 222 was unreasonable and arbitrary in several fundamental respects: it contradicted Congress' intent in enacting Section 222; represented a sudden and unwarranted departure from prior Commission policy regarding a carrier's own use, including among its affiliates, of CPNI; and was virtually unprecedented in American industry, where cable operators, credit card companies, on-line retailers, and almost all other businesses are allowed to collect and use individually identifiable customer information – regardless of "privacy" concerns.

In light of the serious constitutional questions under the First Amendment raised by the FCC's interpretation of Section 222, the Tenth Circuit was bound, if possible, to construe the statute to avoid those constitutional questions. *E.g., Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Constr. Trades Council*, 485 U.S. 568, 575 (1988). Indeed, the FCC's very efforts to brush off these grave constitutional issues warranted vacating the CPNI rules, because that failure "to give adequate consideration" to constitutional objections to agency action is "the very paradigm of arbitrary and capricious administrative action." *Meredith Corp. v. FCC*, 809 F.2d 863, 865, 874 (D.C. Cir. 1987).

B. The "Privacy" Interest Cited By CPI Is Inconsistent With The Administrative Record

CPI refers repeatedly to the "privacy" interests implicated by the transfer of CPNI "mailing lists" (Pet. 9) or by "the disclosure of private customer information information." *Id.* at 6. But the CPI petition should be denied because the "privacy" interest arising from the disclosure of CPNI to unaffiliated third parties was not meaningfully analyzed by the FCC. In fact, CPI's argument finds no support in the administrative record.

In the administrative proceeding before the FCC, telephone carriers such as U S WEST had acknowledged that the

Commission could well draw a distinction between a carrier's internal use of CPNI and a carrier's disclosure of such information to third parties. Survey after survey has shown that consumers draw precisely such a distinction: they expect customer information to be shared within the corporate family with which they have an established business relationship, but desire greater control when it is disclosed to third parties like telemarketers. Accordingly, U S WEST argued that, even if the FCC were to adopt an opt-in approach for third-party disclosures, the evidence showed that a prior affirmative consent requirement was utterly unwarranted for carrier use of CPNI to speak to its customers. The FCC ignored this evidence. *See* pp. 9-13, *supra.*

Hence, CPI's effort to use "privacy" as a justification for the CPNI regulations has no basis in the administrative record. In fact, the record shows that any "privacy" interest arises only with respect to third-party disclosures, not with respect to internal carrier use of CPNI. There is thus a fatal mismatch between the administrative record and the "privacy" interest asserted by CPI.

C. CPI's Criticisms of the Decision Below Are Misplaced

CPI makes a number of criticisms of the Tenth Circuit's decision. Even if the criticisms were valid, they would not warrant certiorari. At most, CPI has challenged the Court of Appeals' application of settled law for entirely fact-specific reasons. In any event, CPI's attacks on the Tenth Circuit rest on caricature and misinterpretation.

First, CPI contends that the CPNI rules do not raise any First Amendment issue at all, because CPNI is data, not speech, and that the rules thus do not represent "a direct ban on communication with customers." Pet. 9. The Tenth Circuit expressly considered and properly rejected these arguments, and there is no warrant for revisiting its decision. Pet. App. 11a-13a, 17a-18a n.5.

CPNI is an essential ingredient of communication. CPNI is

to telephone carriers what wire stories are to newspapers: the raw source material from which information and communications are crafted. CPNI is data, but the communication of data is the essence of speech. This Court has applied the First Amendment to regulations falling on *physical objects* (let alone clusters or bits of information) that are essential ingredients in expression. *E.g., Minneapolis Star v. Minnesota Comm'r of Revenue*, 460 U.S. 575, 581 (1983) (newsprint and ink).

The obvious, and indeed not genuinely disputed, practical effect of the CPNI rules is to choke off two separate kinds of speech. First, the CPNI rules have a prohibitive effect on CPNI-related communications within a telecommunications carrier, and within the carrier's corporate family: different divisions, affiliates, and personnel within the same carrier will not be able to engage in CPNI-related speech because prior affirmative consents will in the vast majority of cases be difficult or impossible to obtain, not because of customer objection but because of customer apathy. An employee in the landline division, for example, will be prohibited from communicating CPNI-related information to her counterpart in the wireless division.

Second, if prior affirmative consents cannot be obtained, carriers will be forbidden from using CPNI to discuss with customers various related categories of services and products those customers may need or desire. The rights of both speaker and audience are thereby infringed. The FCC acknowledged that its interpretation of Section 222 might "constrain carriers' ability to more easily 'target' certain customers for marketing." *CPNI Order* at ¶ 106. The Commission did not, and could not, dispute that requests for affirmative consent have extremely low response rates. In fact, the FCC itself pointed to the U S WEST trial to show that U S WEST's outbound mail campaign produced affirmative consents in the range of 6-11% and that only about 29 percent of customers give their consent when called by a carrier. *Id.* at ¶ 111. The FCC acknowledged that its *Order* "might make incumbent carriers' marketing efforts less

effective and potentially more expensive" (*id.* at ¶ 66) and cited comments indicating that "restricting intra-firm use of CPNI makes product development and marketing more costly and less efficient, thereby raising prices and reducing the quality and variety of service." *Id.* at n.244. Before the Tenth Circuit, the FCC acknowledged, as the record in this case proves, that "[t]he carriers are almost certainly correct in their expectation that many customers will not give them advance approval" and that "customers would not give affirmative approval for use of their CPNI in a high percentage of cases – regardless of the level of confidence that might have built up over the years of the carrier-customer relationship." FCC Br. 19.

The CPNI rules thus prevent individualized or customized speech – and they do so beyond any degree that might be warranted by concerns for privacy. A carrier's ability to use mailing lists or customer research data to attempt to tailor its speech to its customers (Pet. 14) is not an adequate substitute because audiences are not fungible, *see Schneider v. State of New Jersey*, 308 U.S. 147, 163 (1939), and there is no guarantee that these measures would allow a carrier to reach *the same customers* as would the use of CPNI. "The First Amendment protects [the speakers'] right not only to advocate their cause but also to select what they believe to be the most effective means for doing so." *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Thus, in *Shapero v. Kentucky Bar Ass'n*, 486 U.S. 466 (1988), this Court recognized an attorney's First Amendment right to send targeted solicitation letters to potential clients by name. *See also Edenfield v. Fane*, 507 U.S. 761, 770-71 (1993) (CPA's right to engage in in-person solicitation); *Rubin v. Coors Brewing Co.*, 514 U.S. 476, 488 (1995) (right to disclose alcohol content on beer labels (targeted speech)).

CPI apparently concedes that, if the CPNI rules explicitly barred carriers from engaging in individualized and customized speech, then the First Amendment would be implicated. CPI takes the view that, short of such an express ban, the practical impact of the CPNI rules on carriers' communications with their

customers is not constitutionally cognizable. There is no legal support for that argument. In fact, this Court squarely rejected it in *Riley v. National Federation of the Blind, Inc.*, 487 U.S. 781 (1988). There, this Court held that a financial regulation of professional fundraisers could not be defended as a "merely economic" regulation having "only an indirect effect on protected speech." *Id.* at 789 n.5. This Court struck down under First Amendment scrutiny a rule limiting a professional fundraiser to a "reasonable" fee, even though by its terms the law did not ban any speech at all. *See also Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (striking down on First Amendment grounds a statute regulating contracts between charities and professional fundraisers and forbidding such contracts if, after allowing a deduction for many of the costs associated with the solicitation, the fundraiser retained more than 25% of the money collected); *Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620 (1980) (invalidating local ordinance requiring charitable solicitors to use 75% of funds solicited for charitable purposes). This Court has frequently applied the First Amendment to strike down other laws that did not by their terms prohibit speech, but that simply regulated activities having a connection to expression. *E.g., NTEU v. United States*, 513 U.S. 454, 469 (1995) (striking down a ban on honoraria because it decreased the "incentive" of government employees to speak); *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105 (1991) (invalidating New York's "Son of Sam" law, which prevented criminals from profiting from publishing deals involving stories about their crimes).

In none of these cases did this Court require an explicit ban on speech before finding the First Amendment applicable. Rather, this Court has always looked to the practical effect of a law on communicative activity. Consider, for example, *Martin v. Struthers*, 319 U.S. 141 (1943), on which CPI puts great emphasis. The ordinance invalidated in *Martin* did not actually *prohibit* speech in the form of uninvited door-to-door

solicitation; the ordinance merely made it unlawful "for any person distributing handbills, circulars, or other advertisements to ring the door bell, sound the door knocker, or otherwise summon the inmate or inmates of any residence to the door . . . ." *Id.* at 142. The solicitor was free to distribute handbills; he or she simply could not ring or knock unless previously invited. Similarly, in *Meyer v. Grant,* 486 U.S. 414, 424 (1988), this Court struck down a ban on the payment of petition circulators – not a rule restricting what they could say or controlling *any* feature of their speech as such. And in *NAACP v. Claiborne Hardware Co.,* 458 U.S. 886, 912 (1982), this Court held that even generally applicable tort laws (which did not target speech at all) were unconstitutional as applied to an expressive boycott because of the "incidental effect on First Amendment freedoms."[11]

Next, CPI claims that the Tenth Circuit misapplied the "narrow tailoring" requirement and instead imposed a "least restrictive alternative" test. Pet. 17-19. That is patently untrue. The Tenth Circuit expressly recognized that "clearly the government need not employ the least restrictive means to accomplish its goal." Pet. App. 28a. "We do not require the government to consider every conceivable means . . . . We merely recognize the reality that the existence of an obvious and substantially less restrictive means for advancing the desired government objectives indicates a lack of narrow tailoring." *Id.* at 29a-30a n.11. This approach is fully consistent with, and indeed mandated by, this Court's precedent. *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 517 (1996) (plurality opinion) ("It is perfectly obvious that alternative forms of regulation that would not involve any restriction on speech would be more likely to achieve the [Government's] goal."); *Rubin v. Coors*

---

[11] This case of course does not involve a restriction upon access to government information, as in *Los Angeles Police Dept. v. United Reporting Publishing Corp.*, 120 S. Ct. 483 (1999). CPNI is information within a telephone carrier's possession.

Brewing, 514 U.S. at 490 ("We agree that the availability of these options, all of which could advance the Government's asserted interest in a manner less intrusive to respondent's First Amendment rights, indicates that [the statute] is more extensive than necessary."); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 417 & n.13 (1993) (considering possible alternatives to restriction on speech); *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 566 (1980) (government must make showing "that a more limited restriction" on speech "would not serve adequately the [governmental] interests"). The proven efficacy of a notice and opt-out option demonstrates that the stringent approach taken in the *CPNI Order* is not narrowly tailored to the asserted interest.

Finally, CPI suggests that the Tenth Circuit failed to defer to administrative and congressional policy judgments and engaged in an improper "collateral attack" on Section 222. However, the legal issue framed by CPI is not presented by this case. There are no congressional findings to support the FCC's rules, and the Tenth Circuit's invalidation of the FCC's regulations is not an indirect attack on Section 222 itself. The FCC does not and cannot claim that its approach was compelled by Section 222, and the FCC cannot hide behind Congress in justifying the CPNI rules. The constitutional defect in the rules is not a "facial" one inhering in Section 222; the constitutional issues arise solely from the interpretation adopted by the FCC. The FCC has acknowledged that the term "approval" is "ambiguous" and that "section 222(c)(1) does not specify what kind of approval is required." *CPNI Order* at ¶¶ 86, 87. The word "approve," "in its strictest etymological construction, is an after-the-fact ratification." *AT&T Communications, Inc. v. Southwestern Bell Tel. Co.*, No. A 96-CA-397 SS, at 9-10 (W.D. Tex. 1996). The FCC itself cited a dictionary definition of "approve" as meaning "ratify." *CPNI Order* at ¶ 91 n.336. Nowhere is there clear statutory authorization for the FCC's gratuitously severe interpretation of Section 222 to require explicit prior affirmative consent.

In any event, CPI is wrong because a court reviewing challenged agency regulations is not required to assume the constitutionality of the underlying statute and indeed is perfectly entitled to rule on the statute's validity. *See, e.g., Denver Area Educ. Telecom. Assn., Inc. v. FCC*, 518 U.S. 727 (1996) (striking down statutory provisions based on a challenge to implementing regulations). If the Tenth Circuit had concluded that Section 222 compelled the action taken by the FCC, it would have had the power and, indeed, the duty to hold the statute unconstitutional. The Tenth Circuit would not have been required blindly to accept any detailed congressional findings in support of the FCC's CPNI rules. "Deference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 843 (1978). Both in *Greater New Orleans Broadcasting*, 119 S. Ct. at 1932-35, and in *Coors Brewing*, 514 U.S. at 487-91, this Court refused to defer to congressional policy judgments and invalidated federal statutes under intermediate scrutiny. In *Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622 (1994), a plurality of the Court explained that, even when Congress itself makes "unusually detailed" factual findings that "are recited in the text of the Act itself," 512 U.S. at 632, 646 — which Congress did *not* do in Section 222 — under intermediate First Amendment scrutiny a reviewing court is obligated to exercise "independent judgment" to ensure that the Government has "demonstrated that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 665, 666.[12]

---

[12] The cable must-carry rules at issue in *Turner Broadcasting* were ultimately upheld on remand. This Court noted, in addition to the extensive factual findings made by Congress in the text of the statute itself, "a record of tens of thousands of pages" supporting the rules. *Turner Broadcasting System, Inc. v. FCC*, 520 U.S. 180, 187 (1997) (*Turner II*) (internal quotation omitted). Nothing of the sort exists in this case.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

DAN L. POOLE
ROBERT B. MCKENNA
KATHRYN MARIE KRAUSE
Suite 700
1020 19th Street, N.W.
Washington, D.C. 20036
(303) 672-2859
Counsel for U S WEST, Inc.

LAURENCE H. TRIBE
Counsel of Record
JONATHAN S. MASSEY
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

M. ROBERT SUTHERLAND
Suite 1800
1155 Peachtree Street, N.E.
Atlanta, GA 30309-3610
(404) 249-4839
Counsel for BellSouth Corp.

JAMES D. ELLIS
ALFRED G. RICHTER, JR.
175 E. Houston
San Antonio, TX 76802
(210) 351-3500

WILLIAM A. BROWN
1401 I Street, N.W.
Suite 1100
Washington, D.C. 20005
(202) 326-8904
Counsel for SBC Communications, Inc.

May 1, 2000